



## STATEMENT OF THE CASE

Appellant-Defendant, Jeramey Smith (Smith), appeals his sentence for robbery, as a Class C felony, Ind. Code § 35-42-5-1, and burglary, as a Class A felony, I.C. § 35-43-2-1.

We affirm.

## ISSUES

Smith raises two issues for our review, which we restate as:

- (1) Whether the trial court abused its discretion when sentencing Smith; and
- (2) Whether his sentence is inappropriate when the nature of his offense and his character are considered.

## FACTS AND PROCEDURAL HISTORY

Smith is appealing his sentence following a remand to the trial court after our previous decision in *Smith v. State*, 872 N.E.2d 169 (Ind. Ct. App. 2007), *trans. denied* (Smith I). In that decision, we stated the relevant facts and procedural history as follows:

On October 31, 2005, Smith, Steven Cadet, Cornelius Compton, Rex Abel, Terronte Booker, Jonathon Johnson, and a person identified only as “Dee” discussed “hitting a lick,” or committing a robbery. The group dressed in black clothes with masks and went to Yvonne Fellows’s house, where the group believed Fellows’s son would be with a large amount of marijuana and cash. When the group arrived at the house, Fellows answered the door and, assuming that the group was made up of trick-or-treaters, turned to reach for her candy bowl. At this point, someone struck Fellows with a hard object and knocked her to the floor. Someone then held a gun to Fellows’s head and said, “Where’s your M.F. son at; where’s your M.F. son at? I didn’t want no candy, B. Where’s your son? I’m going to blow your M.F. head off, where’s your son at?” Transcript at 25-26. Fellows repeatedly stated that her son was not at home. Eventually, four members of the group went upstairs, ransacked Fellows’s son’s room, and took marijuana. Smith remained downstairs with a gun pointed at Fellows, and two others remained with him. Cadet took Fellows’s wallet out of her purse while Smith held her at gunpoint. As the

group left the house, Fellows was shot in her back. Fellows's daughter, B.H., arrived at roughly the same time Smith and his cohorts were leaving the residence, and threw a lawn chair at them as they ran away. B.H. entered the house and discovered her mother had been shot. She attempted to find a phone to call 911, but discovered that all the phone jacks had been ripped out of the walls. Fellows then told B.H. that a cell phone was in her purse, and B.H. called 911. Fellows was transported to the hospital where she underwent surgery for life-threatening injuries. She sustained fractured ribs, bruised lungs, and broken facial bones.

\* \* \*

The State charged Smith with burglary, robbery, and attempted murder. At his trial, Fellows, B.H., Cadet, Compton, Watkins, and others testified on behalf of the State. Testimony consistently placed Smith at the scene, but was somewhat conflicting as to whether Smith had been the person who shot Fellows.

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The jury found Smith guilty of burglary and robbery, but not guilty of attempted murder. The trial court then conducted a sentencing hearing. At this hearing, the trial court declined to enter a judgment of conviction for robbery, as it found that it had the same elements as the burglary count. The trial court then made the following statement regarding sentencing:

The [c]ourt notes the defense's argument that there are mitigating circumstances and that would be the defendant's ... they argued that his age and his education are mitigators. The [c]ourt does not agree with that. The [c]ourt does not find that his age and his education are mitigating circumstances. I have proof of his age. I have no evidence at all in front of me concerning his education other than the pre-sentence investigative report that indicates that he did not graduate or get a GED. The [c]ourt finds no mitigating circumstances. I don't think there are any aggravating circumstances other than the offense itself, it's a very aggravating offense what the defendant did in this case whether he was the shooter or not. The Court feels the appropriate sentence is thirty years.

*Id.* at 172-74 (internal reference omitted).

In *Smith I*, we held that although Smith had not waived his challenge against the trial

court's refusal to grant a mistrial, a mistrial was not warranted despite a witness' mention of Smith's time at a youth correctional facility. *Id.* at 176. Further, on a cross appeal by the State, we held that the jury's verdict of guilty of robbery could stand if the conviction was reduced to a Class C felony, and therefore instructed the trial court to enter a conviction on remand for robbery as a Class C felony. *Id.* at 177. And finally, we concluded that the trial court did not abuse its discretion by failing to find Smith's youth to be a mitigating factor, but added that it had not entered a sufficiently detailed sentencing statement and remanded with instructions to do so. *Id.* at 179.

On October 18, 2007, the trial court entered a new sentencing order with a new sentencing statement. However, the trial court learned that Smith had petitioned for transfer to our supreme court. Thereafter, on November 16, 2007, after our supreme court denied Smith's petition to transfer, the trial court re-entered its sentencing statement. The trial court stated that it considered the facts that Smith, or individuals he was with, used a deadly weapon, shot the victim in the back, and struck the victim in the face and that Smith had admitted to prior juvenile adjudications. Following that consideration, the trial court imposed the advisory sentence of thirty years on Count I, burglary as a Class A felony, I.C. § 35-43-2-1, and the advisory sentence of four years on Count II, robbery, as a Class C felony, I.C. § 35-42-5-1, with those sentences to be served concurrently in the Department of Correction.

Smith now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Aggravation*

Smith argues that the trial court abused its discretion upon remand because it relied upon an improper aggravating factor. Specifically, Smith contends that the trial court erred by relying upon the material elements of the crime to support its sentencing decision.

Our supreme court clarified a defendant's right to appellate review of a trial court's sentencing decision by stating, "[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *aff'd on reh'g*. An abuse of discretion occurs if we find the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). The trial court no longer has any obligation to weigh aggravating and mitigating factors, and therefore cannot be said to have abused its discretion in failing to properly weigh those factors. I.C. § 35-38-1-7.1(d); *see also Anglemeyer*, 868 N.E.2d at 491. However, if the trial court includes a finding of aggravating or mitigating circumstances in its recitation of its reasons for imposing a particular sentence, then a sentencing statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be aggravating or mitigating. *Anglemeyer*, 868 N.E.2d at 490. Another way in which a trial court may abuse its sentencing discretion is by applying aggravating factors that are improper as a matter of law. *Id.* at 490-491.

Smith contends that the trial court relied upon elements of his burglary offense to enhance his sentence. More specifically, his contention is that burglary as a Class A felony requires bodily injury or serious bodily injury. I.C. § 35-42-1-5. And, the trial court relied on the facts that Smith shot the victim in the back and that the victim was struck in the face to aggravate or enhance his sentence. Smith explains that “[t]his [c]ourt has routinely held that the trial court may not enhance or aggravate a sentence based upon factors that constitute elements of the charged offense.” (Appellant’s Br. p. 10 (citing *Thompson v. State*, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003))). Thus, Smith urges us to conclude that the trial court imposed aggravating factors, which are improper as a matter of law.

The State argues in response that since the trial court gave Smith the advisory sentence, “[t]he trial court *did not* find any aggravating factors.” (Appellant’s Br. p. 9 (emphasis in original)). In Smith’s previous appeal, we analyzed the trial court’s statement that the nature of the offense was “very aggravating.” *Smith*, 872 N.E.2d at 179. We noted that “the trial court here did not explain what about the crime was aggravating; that is, what about this crime was worse than a typical burglary as a Class A felony.” *Id.* However, just as the circumstance before us now, the trial court had given Smith the advisory sentence, and found no mitigating factors.

Nevertheless, we conclude that the trial court has not abused its discretion here. “It is true that a material element of a crime may not be used as an aggravating factor to support an enhanced sentence.” *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). However, when evaluating the nature of the offense, ‘the trial court may properly consider the particularized

circumstances of the factual elements as aggravating factors.’” *Id.* (quoting *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001)). We conclude that by recognizing the facts that Smith, or his co-perpetrators, brandished a deadly weapon, and that the victim was shot in the back and struck in the face, the trial court has properly identified and relied upon the particularized circumstances of Smith’s crime. For this reason, we conclude that the trial court has stated a sufficiently detailed sentencing statement and has not abused its discretion with its imposition of the advisory sentence.

## II. *Was Smith’s Sentence Inappropriate?*

Additionally, we have the authority to review the appropriateness of a sentence authorized by statute through Indiana Appellate Rule 7(B). That rule permits us to revise a sentence if, after due consideration of the trial court’s decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer*, 868 N.E.2d at 491. Our supreme court has encouraged us to critically investigate sentencing decisions. *See, e.g., Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001). The purpose of the express authority to review and revise sentences is to ensure that justice is done in Indiana courts and to provide unity and coherence in judicial application of the laws. *Pruitt v. State*, 834 N.E.2d 90, 121 (Ind. 2005).

In reviewing the nature of the offense, we agree with the trial court here. The facts that the victim was struck in the face and shot in the back during the commission of the burglary and robbery independently support the imposition of the advisory sentence without

further analysis of Smith's character. Therefore, we conclude that Smith's sentence is not inappropriate in light of the nature of the offense.

### CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it sentenced Smith, and that Smith's sentence is not inappropriate.

Affirmed.

BAKER, C.J., and ROBB, J., concur.